IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE ex rel. ROBERT MERRILL, TRUSTEE, *et al.,*	)	**CASE NO. 04CV001080**
Plaintiffs-Relators,	)	**JUDGE EUGENE A. LUCCI**
and	)	
HOMER S. TAFT, *et al.*	)	
Intervening Plaintiffs and Plaintiffs-Relators,	)	
vs.	)	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.,*	)	
Defendants-Respondents and Counterclaimants	)	
And	)	
NATIONAL WILDLIFE FEDERATION, *et al.,*	)	
Intervening Defendants and Counterclaimants	)	

INTERVENING PLAINTIFFS' STATEMENT OF FACTUAL AND LEGAL ISSUES REQUIRING DETERMINATION

Determination of the remaining factual and legal issues for disposition necessarily begins with what the Supreme Court of Ohio decided prior to remand. The Supreme Court unanimously upheld the full decisions of *Sloan v. Beimiller* (1878), 34 Ohio St. 492, and *State v C&P Rd. Co.* (1916), 94 Ohio St. 61, including the entire syllabi of those decisions. *Sloan's* syllabus unanimously holds that the natural shoreline defines the terminus of the public trust as well as the terminus of a privately owned parcel describing only Lake Erie as its boundary, and that

natural shoreline is determined by wherever the water usually is *when free of disturbing causes*. Sloan unanimously determined, inter alia, that the owner had the right of preventing landing on or traversing any part of the "shore" and that the boundary of a deed referring to Lake Erie as its boundary extended beyond the ordinary high water mark to a place where the water usually is when free of disturbing causes. *C & P Rd.* unanimously held that the upland owner possesses certain littoral rights beyond the natural shoreline, including the right to access and use the waters of the Lake and to wharf out into navigable waters.

While the reason two justices joined only in the syllabus and the conclusions are unexplained in the Supreme Court's decision, the Court by at least five justices determined in the opinion, without dissent, that :

a. The terminus of private lands is always beyond the ordinary high water mark at the natural shoreline, absent a deed extending it further , and that *Sloan* specifically rejected OHWM as the boundary of the public trust.
b. The "presumptively valid deeds" of upland owners are not voided or altered by the Court's decision, requiring an examination of the lawful chain of title and physical survey of that owner's lands before depriving them of lands devised by deed.
c. Littoral rights to ownership of all accretions, to restore all avulsions, to build wharf structures into the Lake, and to use and access the waters are protected littoral rights that the State must respect and empower.

The issues remaining before this Court subsequent to the Supreme Court decision involve determination of any injunctive relief or declaration of rights and recovery of fees under Count I of the Plaintiffs' and Intervening Plaintiffs' Complaints as well as the writ of mandamus requested under Counts II and III respectively of those Complaints. To the extent that any determinations of this Court involve actual determination of where the water usually meets the land when free of disturbing causes or any issue based upon lake levels, considerable factual issues remain as to what constitutes natural shores or undisturbed water levels. Further, any diminution of lands previously observed, surveyed and deeded that were above water when title

was initially determined presents a question of whether the loss of such lands was due to avulsion or unnatural occurences, or to *natural* erosion unaffected by government action.

I. UNDER COUNT I OF PLAINTIFFS-RELATORS COMPLAINT, AN APPLICATION FOR FEES IS PENDING.

Plaintiffs-Relators have filed a motion for allowance of fees and expenses, which raises a legal issue and potential factual disputes with other parties. Intervening Plaintiffs support the allowance of the fees and expenses of Class Counsel.

II. UNDER COUNT I OF THE PLAINTIFFS-RELATORS AND INTERVENING PLAINTIFFS RESPECTIVE COMPLAINTS, A MANDATORY INJUNCTION WITH DECLARATION OF RIGHTS SHOULD BE GRANTED REQUIRING THE OHIO DEPARTMENT OF NATURAL RESOURCES TO REPLACE ITS POLICIES AND LEASES WITH PROPER REGULATIONS AND REQUIRING THE DEPARTMENT TO RESPECT AND EMPOWER THE LEGITIMATE LITTORAL RIGHTS OF UPLAND PRIVATE OWNERS WITH DUE PROCESS.

A. The Department Should Be Enjoined From Claiming Ownership Or Control Of Any Lands Along Lake Erie That Are Described Or Contained In A Deed In The Chain Of Title Of A Private Owner Unless And Until The Department Establishes By Preponderance Of The Evidence, In An Independent Proceeding Affording Due Process, That The Deed Is Not Valid Or That The Deed Describes Lands Once Above Water That Have Been Permanently Lost By Natural Erosion Rather Than Avulsion Or Unnatural Erosion.

ODNR, in a reversal of its past positions, pursued a "policy" since about 2000 that they exclusively owned and controlled all lands lakeward of the Ordinary High Water Mark unsupported by any adopted regulation and contrary to Ohio law and statute, as the Supreme Court as well as this court have conclusively established.

Defendant Department of Natural Resources placed a cloud upon the title of all upland owners lands along Lake Erie by improperly asserting ownership and control of all lands lying beyond the OHWM as it, without regulation, defined or determined it from time to time, with no

regard for the valid chain of title of private owners and complete disregard for the significant impact of avulsions on the change of shoreline that left ownership of lands under water in private ownership subject to restoration. The Department actively influenced title companies and county engineers to compel deeds to be altered to the OHWM. In its actions, the Department has never afforded private citizens their due process rights to a fair hearing, nor undertaken to sustain its burden of proof to overturn "presumptively valid deeds." The appropriate remedy for this is to enjoin the Department to honor the "presumptively valid deeds" of private owners and their right to restore lost lands unless and until they establish, in a separate, independent proceeding that the chain of title is invalid or that the lands they claim altered by erosion were caused by natural erosion, not avulsion or governmental action.

There is within this question a further subissue that water levels on Lake Erie have at times since 1938, by governmental action, been abnormally high and beyond the ordinary high water mark to that point, and that there have been governmental structures built that have caused beach destruction on downdrift properties. Erosion caused by these un-natural causes should not be treated as lands lost to natural erosion, and this court should enjoin the Department from doing so. Defendant ODNR represented before this court, the Court of Appeals, and the Supreme Court that they would honor the presumptively valid deeds of private littoral owners. Intervening Plaintiffs therefore expect Defendants would consent to such relief. The issue should be solely a legal issue, but if Defendants contest ODNR influenced changing deeds, could also present a factual issue.

B. DEFENDANTS SHOULD BE ENJOINED TO VOID ALL LEASES WHICH THEY HAVE COMPELLED PRIVATE OWNERS TO SIGN CLOUDING TITLE TO THEIR PROPERTY BELOW THE ORDINARY HIGH WATER MARK ON LANDS CONTAINED WITHIN THEIR DEEDS.

In enforcing its "policies", the Department has forced private owners who already had structures to execute leases of property already owned by the private owners and made agreeing to forfeit one's claim to their lands a condition of building littoral structures they had an absolute right to erect to protect their property and use and access the shore and the waters of Lake Erie This court should enjoin the Department to void all leases that included lands contained in the presumptively valid deed of owners, and should be enjoined to cease requiring leases on lands contained within the deeded lands of private owners. Intervening Plaintiffs believe the issue is purely a legal question, without factual dispute.

C. THE DEPARTMENT SHOULD BE ENJOINED TO RESPECT THE LITTORAL RIGHTS OF UPLAND OWNERS TO ACCRETION, RESTORATION OF AVULSION, WHARFING OUT TO NAVIGABLE WATERS AND USE AND ACCESS TO THE LAKE'S WATERS AND FROM PROHIBITING OR INTERFERING WITH ANY EXERCISE OF THOSE LITTORAL RIGHTS BY UPLAND OWNERS UNLESS AND UNTIL IT HAS ADOPTED AND SUBMITTED TO LEGISLATIVE REVIEW AND THE REVIEW OF THIS COURT REGULATIONS AS REQUIRED BY STATUTE CONFORMING TO THE SUPREME COURT'S DECISION.

The Supreme Court of Ohio has noted that private owners have the right to all accretions and to restore all lands lost to avulsion, as agreed to by all parties before the Court. Defendants' "policies" have ignored the difference between avulsion and erosion and have improperly attributed all shoreline recession to erosion, until their concession of those rights on appeal in this case. The Department has also regularly denied owners the right to wharf out to navigable waters without any showing that it would impair navigation or fishery, which the Supreme Court has declared are the exclusive powers of the State under the public trust. Chapter 1506 of the Revised Code requires the Department of Natural Resources to adopt regulations under which it administers its duties, which it has completely failed to do in these areas. Unless and until the

Department adopts regulations and procedures to allow these rights to preserve and restore property and exercise littoral rights in a manner compatible with the Supreme Court's holdings, the court should enjoin the Department from interfering in any way with the right of owners to restore avulsions, claim accretions, wharf out into Lake Erie's navigable waters or access and use the waters of the Lake.

D. THE DEPARTMENT SHOULD BE ENJOINED FROM ENFORCING ANY "POLICY" OR "INTERPRETATION" OF LAW NOT ADOPTED BY REGULATION IN CONFORMITY WITH ITS CONTROLLING STATUTES.

ODNR has pursued since 2000 a set of "policies" and "interpretations" of the law incompatible not only with the Supreme Court's ruling, but with its own empowering statutes requiring it to adopt regulations, which are subject to JCARR review and have sunset provisions, on any matters where it purports to interpret or further the statutory duties it has been given. ODNR has completely and totally failed to adopt regulations to do so, and in particular has at no time since its adoption of its new "policies" around 1999 or 2000 adopted any regulations or subjected itself to legislative review of those policies. This Court has jurisdiction to enjoin the Department to adopt regulations setting forth any requirements or "policies" and subject them to legislative review. Intervening Plaintiffs believe this is purely a question of law.

E. THIS COURT SHOULD RETAIN CONTINUING JURISDICTION OF THIS MATTER TO ENFORCE COMPLIANCE WITH ITS ORDERS BY THE STATE OF OHIO AND ITS DEPARTMENT OF NATURAL RESOURCES.

Given the continually shifting sands of the positions taken by the State and its Departments and Officers on these issues in recent years and the level of disregard for legal process and the rights of private property owners displayed by them in recent years, this court should exercise its right to exercise continuing jurisdiction in this matter to assure compliance with the court's orders by the Department and by the State and its officers. This is purely an issue of law.

III. UNDER COUNTS II AND III OF PLAINTIFFS-RELATORS AND INTERVENING PLAINTIFFS RESPECTIVE COMPLAINTS, A WRIT OF MANDAMUS SHOULD ISSUE TO THE OHIO DEPARTMENT OF NATURAL RESOURCES TO BRING INDIVIDUAL EMINENT DOMAIN PROCEEDINGS AGAINST EACH AND EVERY UPLAND PRIVATE OWNER IN THE STATE OF OHIO FOR THE TEMPORARY TAKING OF THEIR LAKESHORE PROPERTY AND FOR THE PERMANENT TAKING OF SAME UNLESS THE STATE RENOUNCES ITS CLAIM TO LANDS BELOW THE ORDINARY HIGH WATER MARK BUT AT OR ABOVE WHERE THE WATERS USUALLY ARE.

Counts II and III of Plaintiffs-Relators' Complaint and of Intervening Plaintiffs Complaint are mirror images, seeking the same relief. If the State of Ohio fully concedes that lands beneath the OHWM are privately owned by upland owners pursuant to their deeds or to the natural shoreline, wherever that may be located with respect to their specific property, the relief sought by Count III for a writ of mandamus to compel the State to file eminent domain proceedings for permanent taking against each and every lakefront owner might be avoided. However, there is plainly a temporary or regulatory taking which has occurred by the State's actions against every private lakeshore owner in Ohio. The sole remedy provided by law available to this court is to issue a writ of mandamus compelling the State to bring proceedings to appraise the damages to each individual owner, on each individual parcel, in the respective probate courts where the lands are located. Given that Defendants have previously asserted their right to do so before this court, this should present issues of law without factual dispute.

IV. TO THE EXTENT THE COURT MUST DETERMINE ANY MATTER IN THE FOREGOING OR ANY ISSUE PRESENTED BY ANOTHER PARTY BASED UPON LAKE LEVELS OR THE NATURAL SHORELINE, EVIDENTIARY QUESTIONS ARE PRESENTED AND DISCOVERY COULD BE NECESSARY.

Unfortunately, the decision of the Supreme Court of Ohio does not provide complete clarity as to how to establish the location of where the water usually stands when free of disturbing causes on each individual property. The decision could lend itself to the *ordinary* low water mark, or Low Water Datum, (as opposed to the low water mark) especially given its reliance on a case excluding drought from determining that point, or to a boundary that moves seasonally, but not moment to moment, at the water's edge between ordinary high water and ordinary low water marks, or a determination where the water is for something over half the time each year. However, any of these methods necessarily relies upon water levels on the Lake. Unfortunately, sooner or later, that embroils the courts in the morass of data determination. That determination becomes more complex given the fact, as alleged by Intervening Plaintiffs, that the levels of Lake Erie have not been natural since at least as far back as the 1930s, and much more so since 1963. In recent times, the Upper Great Lakes Study of the International Joint Commission, a bi-national governmental body, is the most recent to establish that unnatural changes have occurred in the St. Clair-Detroit River systems that have drained water from Lakes Huron and Michigan into Lake Erie at an abnormally high rate. Similarly, significant changes were made, completed by 1963, in the outlet of the Lake at the Upper Niagara River. Intervening Plaintiffs are relatively certain that the State would dispute these facts, making evidentiary hearings necessary as to any determinations which seek to determine lake levels as a part of any decision. Intervening Plaintiffs cannot determine at this time whether discovery will be necessary with respect to those questions. If the court determines it needs to resolve issues of where the water

usually is, then the State will need to determine whether it can reach agreement on any of the facts and Intervening Plaintiffs and other parties will have to determine if various outside data and reports can be agreed or stipulated to, or whether evidence or expert testimony will be required.

CONCLUSION

Intervening Plaintiffs continue to believe that there are solutions which could be agreed to by all parties that could implement the intent of the Supreme Court's decision, protect littoral owners' private property and littoral rights, and protect the rights of the State of Ohio to reasonably regulate private structures and protect its interests in navigation and fishery in the public trust lands underlying Lake Erie. Intervening Plaintiffs would be willing to engage in any mediation to attempt to achieve those goals, but also believe that actions of the Ohio General Assembly beyond the jurisdictional issues before this Court may be the only way to completely settle this matter short of issuing mandatory injunctions and writs of mandamus.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this **INTERVENING PLAINTIFFS'STATEMENT OF FACTUAL AND LEGAL ISSUES REQUIRING DETERMINATION** was sent by regular U.S. Mail on November 12th, 2011 to the following:

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